Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court

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For all the brilliance of the Framers' original insight that "ambition must be made to counteract ambition,"[1] federalism has been the scene of both great successes and conspicuous failures. It has shielded racism as well as liberty,[2] and it has driven citizens to the battlefield as well as to the negotiating table. Many of the underlying issues of the federal relationship were resolved, not in the peaceful manner intended by the Framers, but rather in the carnage of Manassas, Antietam, and Gettysburg. One could argue that continuing to refer to the Framers' intent in this regard is akin to studying the drawings and notes of the architect for an edifice that collapsed long ago. These failures together with the fundamental changes of the past century have not, however, prevented both the Court and political leaders from looking to Madison, Hamilton, and other constitutional greats of the eighteenth century for guidance on federalism issues.

In fact, federalism's hold on the American political imagination continues unabated.[3] This Article examines several fundamental elements in the American approach to federalism which together reflect outmoded assumptions about the role of states, municipalities, and citizens in today's polity. These analytical weaknesses cut across current debates about federalism, despite substantial variation in the purpose and forum in which they arise.

One debate, being argued in the Supreme Court, considers the extent to which federal powers, especially those under the Interstate Commerce Clause, should be constrained, and the extent to which state powers, especially those reserved by the Tenth Amendment, should be protected. A second debate, raging in the political branches of federal and state governments and most prominent in the deliberations of the 104th Congress,[4] has focused most recently on the size of the federal government, and the extent and manner in which current federal responsibilities should be shifted to the states.

The first debate asks what the Constitution permits or requires, while the second considers what good policy prefers. Courts have looked to the Necessary and Proper Clause, the intentions of the Framers, and the spirit of the Constitution to inform their analysis. Legislators have looked to the presumed policy lessons of the last half century, the realities of federal budget deficits, and their own ideological preferences about the overall role of

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1. THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

2. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994).

3. This attachment to federalism has also been termed a neurosis. *See* Edward Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

4. While this debate has often been propelled over the past several decades by executive branch proposals, its impetus today comes primarily from the state governors and the majority in Congress. These congressional majority proposals to devolve significant federal responsibilities to the States and to give the states more flexibility in spending federal funds are referred to here as the congressional approach. References to the public policy approach are used when the focus is not on the current congressional proposals, but on the approach within the public policy arena (both legislative and executive) over past decades.

government to shape and defend their approaches.

While a great deal has been written about each approach individually, little consideration has been given to their interactions[5] or their common flaws. As explored below, both debates elevate form over substance, fail to treat the federal/state relationship as sufficiently dynamic, misdiagnose the role of states as entities unto themselves and vis-a-vis localities, and place insufficient emphasis on the role of citizens.[6]

This Article articulates a new paradigm of federalism to correct common flaws in the approaches of both the judiciary and the political branches.

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5. A detailed discussion of these interactions is beyond the scope of this Article. However, it is important to note that neither the congressional nor the judicial approaches to federalism occur in a vacuum. The Court has, for example, looked to the growth of grants for states and localities (as determined by Congress) to provide evidence of the ability of states to protect their sovereignty through the national political process; and the final structure of federal/state relationships determined by congressional attempts to block grant welfare, Medicaid, and other funding programs will, in turn, shape the national political process on which the Court relied in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). Success by Congress in shifting responsibilities to the states may: (a) be used to support the argument of the now-weakened Garcia majority that the national political process operates effectively to protect state interests without judicial intervention; and (b) perhaps make future courts more willing to countenance expansion of federal power vis-a-vis the states in other areas, thereby effectively marginalizing the recent decision in United States v. Lopez, 115 S. Ct. 1624 (1995).

6. While this Article emphasizes these shared weaknesses, it is important to note that the congressional and Court approaches to federalism differ in many respects as well. For example, the Court's approach to the benefits of federalism differs significantly from that most frequently offered in the current congressional debate:

(a) While the Court views tension between the levels of government as a "good" which protects liberty, the congressional arena more frequently sees tension between the federal and state governments instead as a "problem" to be solved. This definition of the problem often leads to an analysis which identifies a "bad guy" (the heavy-handed bureaucratic federal government) in tension with a "good guy" (the innovative states which are efficient operators and representatives closely in touch with the people), rather than two levels of government which were designed to be in tension.

(b) There is also disagreement on the role of states as laboratories. Unlike the Court's approach to state experimentation outlined in the Brandeis dissent in New State Ice Co. v. Liebmann, 285 U.S. 262 (1932), which contemplated state experimentation serving as a guide for future federal action, the current congressional approach focuses instead on states as laboratories for each other, rather than for the nation. In addition, under this analysis, state experimentation is premised not on a desire to achieve different ends, but rather on the necessity to take into account unique local circumstances which require different means to achieve shared ends. (Ironically, both approaches ultimately undercut themselves. In the context of the congressional debate, the more one believes that different state actions are the result of unique local circumstances, the less transferable they are to other states. In the context of the Court debate, to the extent that states are truly trying to achieve diverse goals, their experiments will be of minimal value to each other, but will instead serve to further expand the reach of federal powers, as federal legislation overrides state-based majorities by imposing a national solution.)

(c) While the Court views competition among the states for a mobile citizenry as a benefit of federalism, this same competition has engendered in the congressional debate significant worries about the potential of a "race to the bottom." Ironically, neither conservative nor liberal public policy analysts share the Court's view. Liberals agree with the Court that competition among the states will happen, but disagree that such competition is good. Conservatives more frequently disagree with the Court that states will engage in such competition altogether. *See, e.g., Block Grants and Opportunities for Devolution, IV Hearings before the Committee on the Budget, United States Senate*, Vol. IV (US Gov't Printing Office, 1995), Feb. 2, 1995, at 20 [hereinafter Senate Hearings]; *Hearing on the Contract with America: Child Welfare and Childcare. Hearing before the Subcommittee on Early Childhood, Youth and Families of the Committee on Economic and Educational Opportunities, House of Representatives*, 104th Cong., 104-22, Jan. 31, 1995, at 25 [hereinafter House Hearings].

These and other fundamental differences make the shared flaws all the more striking.

Specifically, this new paradigm would: (a) focus more attention on federalism as an instrumental value, thereby considering more explicitly the ultimate outcome desired rather than the formal process or power relationship; (b) recognize that the role of states in the American system has changed since the time of the Founders, and incorporate these new developments into the analysis through a new focus on states as a source of stability in a national constitutional system of robust individual rights; (c) consider more explicitly the role played by local governments as distinct from states in the federal relationship; and (d) incorporate the role of citizens into the federalism debate. Taken together these elements provide the framework for a more nuanced paradigm of federalism which is less concerned with establishing clear demarcations between responsibilities which are federal, state, or local and more concerned with establishing mechanisms that enable each level of government (together with citizens) to do what they do best in each issue area.

After a brief introduction to the malleability of the federalism concept in Part I, Part II focuses on several shared elements in the approaches of the Supreme Court and the Congress, identifying key flaws that characterize the current analysis of federalism. This serves as the basis for Part III, which suggests a new approach to considering federalism—a paradigm relevant for the debates both in Congress and the Court.

I. THE PERILS OF FEDERALISM PARADIGMS

Rarely has a concept so difficult to define as federalism been so venerated. Justice Kennedy has called federalism "the unique contribution of the Framers to political science and political theory."[7] It has been referred to proudly as "Our Federalism." Such praise is not limited to the judiciary. It has been echoed by politicians, historians, and political scientists. K.C. Wheare asserted decades ago that American federalism had determined "the modern idea of what federal government is,"[8] while Felix Morley termed it a "distinctively American contribution to political art."[9] Similar claims have been made more recently: "Ours is the prototypical federal government. We invented the form."[10] Indeed, the triumphs of American federalism have been trumpeted as a model for resolving numerous conflicts overseas,[11] whether the issue is European unity, the division of power among Bosnians, Croatians, and Serbs, or the relationship of Moscow to Chechnya.

This near unanimity does not extend to defining federalism or its benefits.

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7. *Lopez*, 115 S. Ct. at 1638.
8. K.C. WHEARE, FEDERAL GOVERNMENT 1 (1946).
9. *Quoted in* Senate Hearings 45 (quoted by Clint Bolick).
10. Martha Derthick, *The Structural Protections of American Federalism*, NORTH AMERICAN AND COMPARATIVE FEDERALISM: ESSAYS FOR THE 1990S, at 10 (Harry Scheiber ed., 1992).
11. Kramer, *supra* note 2, at 1487-88.

While Woodrow Wilson opined that, "The question of the relation of the states to the federal government is the cardinal question of our constitutional system,"[12] the actual terms "federalism," "federal," or even "federation" do not appear in the Constitution.[13] Indeed, Wilson's approach recognized that the actual bounds of the federal relationship change constantly: "it is a question of growth, and every new successive stage of our political and economic development gives it a new aspect, makes it a new question."[14] Not surprisingly, definitions of federalism abound. A report by the Brookings Institution concluded that the Framers meant by federalism a "political regime in which local units of government have a specially protected existence and can make some final decisions over some governmental activities."[15] Other analysts have found key elements of federalism in the ability of leaders of subordinate authorities to enjoy political authority independent of higher levels of government;[16] "a commitment to decentralized decisionmaking, the avoidance of concentration of power in national government, and the provision of a role for states in areas of domestic policy that directly affect the lives of ordinary people";[17] and a "sharing of power in which citizens relate to two governments, each with consequential roles."[18]

There is also no unanimity as to the benefits of federalism. The Supreme Court has identified its role as a check on abuses of government power as "perhaps the principal benefit of the federalist system," while also noting that:

> It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the states in competition for a mobile citizenry.[19]

Others have focused on federalism as a check on the monopoly power of state government,[20] a way to avoid governmental paralysis,[21] and a mechanism to

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12. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 173 (1961).
13. WHEARE, *supra* note 8, at 1.
14. WILSON, *supra* note 12, at 173.
15. John DiIulio, Jr. & Donald Kettl, FINE PRINT: THE CONTRACT WITH AMERICA, DEVOLUTION AND THE ADMINISTRATIVE REALITIES OF AMERICAN FEDERALISM, (The Brookings Institution's Center for Public Management, CPM 95-1, Mar. 1, 1995), 1 [hereinafter BROOKINGS].
16. Kramer, *supra* note 2, at 1488.
17. Richard Briffault, *Federalism and Health Care Reform: Is Half a Loaf Really Worse than None*, 21 HASTINGS CONST. L.Q. 611, 614 (1994).
18. Richard Nathan, *Defining Modern Federalism*, NORTH AMERICAN AND COMPARATIVE FEDERALISM: ESSAYS FOR THE 1990S, at 91 (Harry Scheiber ed., 1992).
19. Gregory v. Ashcroft, 501 U.S. 452, 458 (1990).
20. Richard A. Epstein, *Exit Rights under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 149 (1992).

preserve markets and further economic development.[22] Indeed, as Larry Kramer has observed, federalism has been claimed to improve government or impede progress, enhance freedom or permit racism, foster participatory democracy or entrench local elites, facilitate diversity or create races to the bottom, protect individual liberty or encourage tyranny, and promote responsible fiscal policy or lead to pressures to expand government.[23]

The history of federalism over the past three decades confirms the "slipperiness" of the federalism concept, as federalism has served less as a coherent policy guide than as a rationale legitimating often contradictory proposals. Over the past twenty-five years Presidents Nixon and Reagan and the current majority in the 104th Congress have all offered new approaches to federalism. In each case, the argument has been made in similar terms: the Federal government has become an unresponsive bureaucracy,[24] thereby necessitating a transfer of power back to the states,[25] which would restore to the system the proper balance intended by the Founders.[26] Yet, these federalism proposals have differed dramatically both in their fundamental

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21. William T. Coleman, Jr., *Federalism, The Great Vague Clauses and Judicial Supremacy: Their Constitutional Role in the Liberty of a Free People*, 49 U. PITT. L. REV. 699 (1988).

22. Barry Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1 (1995).

23. Kramer, *supra* note 2, at 1485.

24. In 1969, President Nixon argued that a "third of a century of centralizing power and responsibility in Washington has produced a bureaucratic monstrosity, cumbersome, unresponsive, ineffective." Address to the Nation on Domestic Program, PUBLIC PAPERS 637 (Aug. 8, 1969) [hereinafter Nixon 1969]. Two decades later, President Reagan described an "overloaded, musclebound" federal government, which "is so far removed from the people that Members of Congress spend less time legislating than cutting through bureaucratic redtape for their constituents." National Conference of State Legislatures, Remarks at the Annual Convention in Atlanta, Georgia 17, Weekly Comp. of Pres. Doc., 834 (July 30, 1981) [hereinafter Reagan NCSL]. Similarly, Speaker Gingrich has compared the "arrogance" of centralizing social program bureaucracy domestically with the government's belief in the 1960s "that it knew how to dominate Vietnam abroad." Newt Gingrich, *A Blueprint for America: Nine Strategies for a Strong Country*, USA TODAY MAGAZINE, Nov. 1995, at 20 [hereinafter *Blueprint for America*].

25. Nixon called for "a New Federalism in which power, funds, and responsibility will flow from Washington to the States and to the people." Nixon 1969, *supra* note 24, at 638. Reagan argued to "return discretion, flexibility and decisionmaking to the State and local level." Reagan NCSL, *supra* note 24, at 835. And Gingrich has often repeated the call to "send power out of Washington to the local communities, where local folks can make decisions to address their specific concerns." *Blueprint for America*, *supra* note 24, at 20.

26. In signing the bill to establish General Revenue Sharing, Nixon noted that "we are also returning to the principles of the Founding Fathers. . . . They came here [in Philadelphia, where the signing took place] to create a balance between the various levels of government. We come here to restore that balance." Statement About the General Revenue Sharing Bill, PUBLIC PAPERS 995 [hereinafter Nixon 1972]. Reagan also hearkened back to the Founders, noting his administration's commitment "heart and soul to the broad principles of American federalism which are outlined in the Federalist Papers of Hamilton, Madison, and Jay, and . . . they're in that tenth article of the Bill of Rights." Reagan NCSL, *supra* note 24, at 834. Similarly, Gingrich has spoken of Ben Franklin's volunteerism and de Tocqueville's analysis of early nineteenth-century America: "It is against this backdrop that our effort to decentralize and devolve government power should be viewed. . . . [W]e are trying to reestablish the American value of individual liberty and the citizens' first claim to their own money." NEWT GINGRICH, TO RENEW AMERICA 104 (1995).

approaches to government and in their application to specific policy issues. While arguing for similar "federalism-enhancing" tools, they endeavored to use these tools to further policies which reflected fundamentally different visions of why the federal/state relationship needed restructuring.[27] For example, Nixon envisioned block grants as a way to further his intergovernmental reforms,[28] while increasing funding to states and municipalities as part of the consolidation.[29] By contrast, block grants represented for Ronald Reagan a stepping stone toward eliminating the federal role. They were "intended to help the federal government disengage itself from what were considered to be traditional state and local functional responsibilities."[30] And they were used as a way to transfer responsibility to the states while simultaneously cutting funding.[31]

Perhaps the most dramatic difference emerged in welfare policy. Nixon proposed a dramatic restructuring of the welfare system through a Family Assistance Plan in which the federal government played the central role in welfare policy.[32] Reagan, on the other hand, preferred a lesser role for the federal government—he proposed a "swap" in which the federal government

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27. Nixon, a "presidential activist in keeping with the temper of his times," was part of an era that witnessed an expansion of centralizing governmental authority as well as an increasing tendency to bypass state governments. TIMOTHY CONLAN, NEW FEDERALISM: INTERGOVERNMENTAL REFORM FROM NIXON TO REAGAN 77 (1988). Federal grant programs rose from 380 in 1968 to 539 in 1980. While 12 percent of federal aid bypassed the states and went directly to the localities in 1968, double that proportion went directly to the localities in 1974. David Walker, *American Federalism from Johnson to Bush*, 21 PUBLIUS 105, 107-08 (1991).

While Nixon saw federalism as a way to strengthen government, making it more active and creative, Reagan was far more skeptical about domestic governmental activism and was fundamentally opposed in many ways to the modern welfare state. CONLAN, *supra* at 12, 222. Reagan's Executive Order outlining basic Federalism principles expressed clearly his preference for a smaller federal government:

> Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government. . . . [U]ncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.

Exec. Order No. 12612, 3 C.F.R. 252 (1987).

Reagan's policies cut resources not just for the federal government but to states and municipalities as well, as his first budget, enacted by Congress in 1981 for Fiscal Year (FY) 1982, cut grants to states and localities by 13% below the baseline for FY82, and $6 billion below actual FY81 spending. Due primarily to this budget and the elimination of general revenue sharing in 1986, states and municipalities saw real spending for federal grants decrease 10% from FY81 through FY87. CONLAN, *supra*, at 115, 127.

28. CONLAN, *supra* note 27, at 3.

29. Annual Message to the Congress on the State of the Union. PUB. PAPERS 54 (Jan. 22, 1971).

30. CONLAN, *supra* note 27, at 151.

31. Reagan's first budget, enacted as the Omnibus Budget Reconciliation Act of 1981, succeeded in replacing 139 categorical programs with 9 new or revised block grants, while cutting funding by 25 percent. Then President of the United States Conference of Mayors, Mayor Richard Hatcher of Gary, Indiana called block grants "deep budget cuts dressed up to look like block grants and sent to state capitals, where we'll have to go through another layer of bureaucracy to find them." CONLAN, *supra* note 27, at 166.

32. Nixon's 1971 State of the Union Address proposed to establish a $2400 floor in federal support per family, $800 more than his earlier $1600 proposal. This would have meant an increase in benefit levels in 20 states, and would, by Nixon's own admission, have increased welfare costs, at least in the short-term. Nixon 1969, *supra* note 24, at 639.

would take over administration of Medicaid in exchange for which the states would assume full responsibility for 40 aid programs, including Aid to Families with Dependent Children and food stamps, together with the excise taxes to support them.[33]

While the rhetorical justifications may be similar, the approach of the 104th Congress has differed in important respects from those of its predecessors. Block grants have been offered not just to consolidate categorical programs, but also as an alternative to entitlement programs, thereby fundamentally transforming the relationship of the federal government to individuals living in poverty.[34] This approach also distinguishes among the levels of government. It does not adopt Nixon's view of all levels of government as potentially "good," or Reagan's perspective of all levels as potentially "bad." Instead, it focuses tremendous attention on the state as a creative institution, worthy of financial support, while the federal government is portrayed as the locus of bureaucracy.[35]

Given these differences and difficulties in defining federalism, any effort to address federalism coherently must be undertaken with some trepidation. This Article focuses not on defining a single comprehensive federalism paradigm, but on several of the key assumptions that have characterized federalism debates most recently in the judicial and congressional arenas, and which have hampered our ability to construct a meaningful federalism paradigm for twenty-first-century America.

II. SHARED FLAWS

While the term "federalism" has been used many different ways in diverse contexts, it remains possible to identify several fundamental and recurring flaws in approaches to federalism which cut across different institutional concerns and political viewpoints. This Part discusses four such flaws, illustrating how they have shaped both the congressional and the Court approaches to federalism.[36] Specifically, while federalism has proven a

33. CONLAN, *supra* note 27, at 151.

34. Richard Nathan, *The 'Devolution Revolution': An Overview*, Symposium, American Federalism Today, ROCKEFELLER INST. BULL. 10 (1996). Under recently proposed block grants, states would receive responsibility for over $120 billion in former entitlement programs such as Medicaid and welfare. This trend toward delegation of greater responsibility to the states has intensified over the past three decades. Nixon's New Federalism offered federal financial assistance to individuals (through entitlement programs, and the proposed Family Assistance Plan), localities (through a portion of general revenue sharing and block grants), and states. Although Reagan continued federal support for individual entitlement programs, his policies clearly preferred the states to localities, as each of his block grants was directed to the states alone. The Newest Federalism now takes this trend a step further with an exclusive focus on the states.

35. *See, e.g.*, GINGRICH, *supra* note 26, at 106 (describing the federal government as a "centralized micro-managed, Washington-based bureaucracy").

36. For purposes of analysis, this Part focuses on the two most recent manifestations of the federalism debate: the policy proposals that have dominated much of the attention of the 104th Congress,

remarkably malleable term, the federalism of both the Congress and the Court share critical flaws.

To begin, both discourses elevate structure and form over substance. The congressional approach has focused on shifting power, ignoring whether that shift will in reality solve the problems of bureaucracy that are used as partial justification for the transfer. The Court has focused on notions of sovereignty and structural protections in the Constitution, ignoring whether its protection of sovereignty serves the underlying goals desired and whether the structures cited serve the intended purposes. Second, both paradigms treat the federal/state relationship as a static one. Congress ignores the fact that the distribution of power among levels of government should change over time, while the judiciary ignores the fact that in such a dynamic process the Court's abstention is as decisive as any form of intervention. Third, both paradigms misdiagnose the role of states: the congressional approach ignores state weaknesses, and the Court ignores fundamental changes in the role of states in today's polity. Moreover, both Congress and the Court focus on states to the exclusion of local governments. Finally, while the Court has made some tentative attempts to incorporate the concept into its jurisprudence, both paradigms still put too little emphasis on a key element of federalism: the relationship of citizens to their government.

A. *Formalistic Approaches to Federalism*

American approaches to federalism today often ignore the underlying goals of federalism and treat it as an end unto itself. The Court has expended considerable energy defining inviolate attributes of state sovereignty and identifying structural protections of that sovereignty in the Constitution, rather than evaluating the extent to which the underlying goals of federalism may be furthered by the Court's holdings. In Congress, the focus on federalism's form (rebalancing power between the federal government and the states) has created an environment in which the federalism banner diverts attention from key underlying issues and results in disparate and contradictory policies.

1. *The Limits of the Formalistic Analysis*

Over the past twenty years, the Court's interpretation of the reach of the Interstate Commerce Clause and the limits imposed upon it by the Tenth Amendment, the primary jurisprudential battleground for defining and protecting federalism, has been anything but stable.[37] The Court has moved

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and the efforts of the Supreme Court to find a stable theoretical basis on which to rest its post-*Garcia* jurisprudence.

37. This instability is not a new development, as it has been an earmark of Interstate Commerce Clause jurisprudence since the Court's early days. In McCulloch v. Maryland, 17 U.S. 316 (1819), Justice Marshall interpreted the Necessary and Proper clause broadly, thereby enabling Congress to

from its *National League of Cities* decision, which prohibited Congress from enacting statutes that "directly displace the states' freedom to structure integral operations in areas of traditional governmental functions,"[38] to *Garcia*'s abandonment of the traditional governmental functions test altogether, leaving states to the protections of "the national political process."[39] More recently, the Court has begun to turn away from the implications of *Garcia*, protecting states through a combination of a "plain statement" requirement when Congress intends to intrude on areas of traditional state sovereignty,[40] coupled with an apparently outright prohibition of congressional "commandeering" of state processes into the service of the federal regulatory process.[41]

Last term the Court, for the first time since the New Deal, invalidated a federal statute for exceeding Congress's authority to regulate interstate commerce under Article I, Section 8 of the Constitution.[42] And while formally an Eleventh Amendment case, the Court's opinion in *Seminole Tribe of Florida v. Florida*[43] underscores the Court's increasing willingness to sacrifice congressional powers on the altar of state sovereignty. The Court has created a "swiss-cheese" *Garcia* in which the holes are becoming progressively more

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enact legislation so long as it is reasonably related to a constitutionally-specified object. The reach of the Interstate Commerce Clause itself was also construed broadly by Marshall in Gibbons v. Ogden, 22 U.S. 1 (1824), which established that Congress can enact legislation regarding all "commerce which concerns more States than one," including legislation that affected intrastate matters. During the *Lochner* era, the Court shifted gears, relying on conceptions of dual sovereignty to distinguish between spheres reserved exclusively for state regulation and those reserved exclusively for federal action. These limits manifested themselves in shifting judicial tests based on whether an activity was commerce (which Congress could regulate) or manufacturing (which it could not), United States v. E.C. Knight Co., 156 U.S. 1 (1895); whether an activity was in the "current of commerce," Swift & Co. v. United States, 196 U.S. 375 (1905); or (on occasion) whether activities had a "substantial effect" on interstate commerce, Houston Texas Ry. v. United States, 234 U.S. 342 (1914). Beginning with NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), the Court has rejected these earlier distinctions, substituting much more permissive tests which focused on whether an activity has a "substantial economic effect" on interstate commerce or even whether an entire class of acts has a "cumulative effect" on interstate commerce, Wickard v. Filburn, 317 U.S. 111 (1942). A further expansion of the reach of the Interstate Commerce Clause came with the Court's approval of its use in applying newly enacted civil rights legislation to restaurants, Katzenbach v. McClung, 379 U.S. 294 (1964), and motels, Heart of Atlanta Motel v. U.S., 379 U.S. 241 (1964), serving interstate travelers or buying food which had moved in interstate commerce. *See generally* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW ch. 5 (1988).

38. National League of Cities v. Usery, 426 U.S. 833, 852 (1976) (holding invalid 1974 amendments to Fair Labor Standards Act which extended minimum wage and maximum hour provisions to almost all employees of states and their political subdivisions). The Court found that Congress had exceeded its authority under the interstate commerce clause in attempting "to prescribe minimum wages and maximum hours to be paid by the States in their capacities as sovereign governments," thereby impairing the states' ability to function effectively in a federal system. The Court held that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by U.S. CONST. art. I, §8, cl. 3." 426 U.S. at 852.

39. 469 U.S. at 554. The *Garcia* Court left open the possibility of judicial intervention to remedy "failings" in this process.

40. *See* Gregory v. Ashcroft, 501 U.S. 452 (1991).

41. New York v. United States, 505 U.S. 144 (1992).

42. *See* United States v. Lopez, 115 S. Ct. 1624 (1995).

43. 1996 WL 134309 (U.S.).

important than the underlying *Garcia* background.

Despite changes in its approach, the Court has consistently employed a formalistic analysis to federalism in which it has placed greater emphasis on abstract notions of sovereignty and structural protections than on actual outcomes. This has manifested itself both in the recent movement away from *Garcia* and in the underlying *Garcia* analysis itself.

One of the formalistic rubrics employed by the Court has been the notion of a sphere of state activity inviolate from federal interference. Originated in *National League of Cities*, this concept resurfaced in *Gregory v. Ashcroft* which viewed the structure of the state government and the character of those who exercise government authority as the means through which "a state defines itself as a sovereign."[44] This reliance on a sphere of inviolate state activity was expanded both in *New York* and in *Lopez*. In *New York* the Court struck down a portion of the Low-Level Radioactive Waste Policy Amendments Act of 1985 on the grounds that it "commandeered" states into the service of the federal government.[45] The Court held that while Congress may attach conditions under its spending power or offer states a choice between regulating according to federal standards or federal preemption, it may not compel states to regulate a certain way, thereby commandeering state machinery for its purposes. This prohibition did not even contemplate a balancing test to consider the countervailing federal interest.[46]

Lopez looked to formalistic distinctions between state and federal powers even further. The Court rejected the Government's argument that Congress could regulate possession of a firearm (even when that firearm may have had nothing to do with interstate commerce), ruling that this would justify congressional regulation of "any activity that it found was related to the economic productivity of individual citizens," including family law, criminal law, or education "where states historically have been sovereign." It would "bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states" and would mean that "there never will be a distinction between what is truly national and what is

44. 501 U.S. at 460. The Court held that the authority to determine the qualifications of a state's most important government officials "may be inviolate" as against Congress' powers under the Interstate Commerce Clause. Justice O'Connor noted, however, that this authority would still be constrained by the Fourteenth Amendment.

45. Specifically, the Court struck down as violating the Tenth Amendment and exceeding the Congress' powers under the interstate commerce clause a "take title provision" that required states unable by January 1, 1996 to dispose of the low-level radioactive waste generated within their borders, upon the request of the generator or owner of the waste, to take title to and possession of that waste, and be liable for all damages incurred by the generator or owner for the state's failure to take possession of the waste.

46. "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." 505 U.S. at 178.

truly local."[47] This focus on abstract notions of state sovereignty produced a particularly ironic result in *Seminole Tribe*: while the Court struck down that portion of the federal statute which enabled Indian tribes to sue states in federal court for failure to negotiate in good faith, it allowed to stand the lower court's ruling enabling tribes to appeal directly to the Secretary of the Interior to prescribe a solution.[48] The protection of state sovereignty in theory limited state options in fact.

In its decisions retreating from *Garcia*, therefore, the Court has increasingly focused on formalistic notions of inviolate spheres of state activity, mechanistically applying those notions to the case at hand.[49] While the *Garcia* approach leads to a different result, it too is grounded in a formalistic analysis of the federal-state relationship, based on an almost reflexive reliance on the structural protections of states in the Constitution,[50] a reliance which is inconsistent both with recent Court decisions and with reality.

As an initial matter one wonders how much of this structural protection survives the reasoning of *U.S. Term Limits v. Thornton*.[51] In *Thornton*, the majority could not have been clearer about where members of Congress owe allegiance: "In that National Government, representatives owe primary allegiance not to the people of a state, but to the people of the Nation."[52] The

47. 115 S. Ct. at 1632. Justice Kennedy's concurrence (joined by Justice O'Connor) continued this focus on sovereignty, with an implicit nod to *NLC*'s original "traditional governmental functions" test. He argued that the Court must "inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern," noting that in such circumstances, "we have a particular duty to insure that the federal-state balance is not destroyed." 115 S. Ct. at 1640. Note the tension between the analyses of accountability in *New York* and in *Lopez*. In the former, O'Connor expressed concern that commandeering of State processes would blur accountability, as the public would not know whom to blame. In the latter, the underlying assumption was that, with or without commandeering, the public followed traditional notions of which areas were federal responsibilities and which were state responsibilities.

48. *See supra* note 43, at 5, 17.

49. Admittedly, the chronology may be the reverse, as Justices may reason backwards from their conclusions to definition of the inviolate nature of that activity. This would merely reinforce the point, however, that the analysis is based on underlying assumptions of the proper extent of state and federal activities, instead of rigorous consideration of the benefits of federalism.

50. In *Garcia*, the Court found that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." 469 U.S. at 550. The Court cited the state role in the selection of the executive and legislative branches of the federal government, including control of the qualifications of voters for House races under U.S. CONST. art. I, § 2; states' role in electing Presidents under U.S. CONST. art. II, § 1; the requirement of equal representation of each state in the Senate and the initial intention of having Senators selected by state legislatures, under U.S. CONST. art. I, § 3; and the Article V requirement that no state be divested of its equal representation in the Senate without that state's consent.

51. 115 S. Ct. 1842, 1855 (1995).

52. 115 S. Ct. at 1855. The Court noted that members of Congress are officers of the entire Union as much as is the President; that all representatives together decide the qualifications of any member; and that representatives were intentionally not paid by the states. The Court consistently hearkened back to these key factors: the Framers "feared that the diverse interests of the States would undermine the National Legislature"; Madison feared that allowing States to differentiate between the qualifications for State and federal electors "would have rendered too dependent on the State governments that branch of the federal government which ought to be dependent on the people alone."

Court concluded that "[t]he Congress of the United States, therefore, is not a confederation of nations in which separate sovereigns are represented by appointed delegates, but is instead a body composed of representatives of the people."[53]

Even without *Thornton*, however, the Court's reflexive reliance in *Garcia* on the structural protections of the Constitution is perplexing. First, those protections that existed previously have clearly been diminished if not dissipated. A wide range of developments, including elimination of poll taxes, prohibitions on exclusion of minorities, the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, *Baker v. Carr*,[54] and *Reynolds v. Sims*,[55] all have limited states' power to determine the qualifications of voters.[56] And the Seventeenth Amendment ended one of the most significant protections: appointment of Senators by their respective state legislatures. In fact, even before the Seventeenth Amendment was enacted, this structural protection had failed to work.[57]

Second, it is questionable whether the protections states do enjoy are a product of their special constitutional status under federalism. Yes, states get grants from the federal government, but so do localities.[58] Yes, Senators may work to protect their states' interests.[59] But they are most vigorous in this regard not when states' interests coincide, but rather when they diverge, e.g., in votes to determine the formula by which federal grants will be distributed to the individual states.[60] Yes, states have succeeded recently in achieving relief from some unfunded federal mandates. But municipalities, which do not enjoy the same structural protections and which enjoy far less autonomy in

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53. 115 S. Ct. at 1863. The Justices remaining on the bench from the *Garcia* decision took the position in *Thornton* that least supported their *Garcia* opinions. Thus, Justice Stevens who had voted with the *Garcia* majority to rely on the structural protections of states in the Constitution, voted with the *Thornton* majority to undercut them. Chief Justice Rehnquist and Justice O'Connor, on the other hand, who had opposed the Court's reliance on structural protections in the Constitution, joined the *Thornton* dissent in voting that the national process should work as the majority in *Garcia* assumed it did.

54. 369 U.S. 186 (1962).

55. 377 U.S. 533 (1964).

56. Kramer, *supra* note 2, at 1508.

57. *Id.*; *see, e.g.*, William Riker, *The Senate and American Federalism*, 49 AM. POL. SCI. REV. 452 (1955); Roger Brooks, Comment, Garcia, *The Seventeenth Amendment and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J.L. PUB. POL'Y 189 (1987).

58. The *Garcia* Court assumed that funding for localities was evidence of states' legislative success, as it lumped together federal grants to both in its examination of the effectiveness of the federal political process in protecting state interests. The reality is the opposite: states and their subdivisions compete with each other for funding, as numerous formula programs reflect the results of state and municipal lobbying to increase their respective shares.

59. Interestingly, the most recent efforts to provide increased flexibility to the states have found their strongest legislative support not in the Senate, but rather in the House of Representatives.

60. In fact, party line voting is much more common than state-line voting.

their states' constitutions,[61] have been at least equally if not more successful in getting state-imposed unfunded mandates reimbursed than states have been in obtaining relief from the federal government.[62] Thus, there is persuasive evidence that the formal structure relied upon by the *Garcia* Court has not succeeded in representing states any more effectively than state structures which represent their localities without such constitutional protection.

The Court's overbearing focus on sovereignty, its continued dalliance with traditional governmental functions, and its reliance on a static structural analysis of federalism protections, all reflect an underlying conception of federalism as an operative value in itself. While it is certainly true that constitutional structure needs to be followed by the Court as a given,[63] an issue such as federalism, which is so inherently difficult to define, requires consideration of underlying values as a guide to textual interpretation. Despite frequent references to the values of federalism, the formalistic analysis behind the Court's holdings has consistently produced court decisions that fail to address the problem of the underlying federal/state relationship.[64] Indeed, some have argued that the Court has rejected federalism every time it really mattered, protecting states only in areas of minor political significance.[65] While *New York* represents a step away from the sovereignty analysis (as the State was not permitted to consent to provisions limiting its own sovereignty), it is a tentative step at most,[66] and the Court continues to struggle[67] with the

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61. While 48 states grant home rule authority to municipalities and 37 states grant such authority to counties, the breadth of this authority differs in each state based on state constitutional and statutory provisions, as well as state court rulings. ACIR, LOCAL GOVERNMENT AUTONOMY: NEEDS FOR STATE CONSTITUTIONAL, STATUTORY AND JUDICIAL CLARIFICATION, Oct. 1993 [hereinafter ACIR-OCT. 1993].

62. By 1992, 10 states had enacted constitutional provisions dealing with state-imposed mandates, a number of which significantly restrict the state (e.g., the California and Missouri provisions). ACIR-OCT. 1993, *supra* note 61, at 55-56. The recently enacted federal Unfunded Mandates Reform Act of 1995, on the other hand, exempts a wide range of mandates (e.g. those enforcing constitutional rights or statutory rights against discrimination), and only a majority vote is required to override its limitations and impose an unfunded mandate on the states. 2 U.S.C. 1503, Pub. L. No. 104-4, Mar. 22, 1995.

63. As O'Connor stated in *New York*: "Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution." 505 U.S. at 157.

64. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976 (striking down extension of Fair Labor Standards Act to states on grounds that state sovereignty trumped federal Commerce Clause power); New York v. United States, 505 U.S. 144 (1992) (finding that "take-title" provision of Low-Level Radioactive Waste Policy Amendments Act was not within scope of Commerce Clause and invaded state sovereignty by forcing states to enact and enforce federal regulatory program); Martha Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84 (1985). Andrzej Rapczynski also points out the limits of the state sovereignty analysis in his classic article *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341.

65. Rubin & Feeley, *supra* note 3, at 949.

66. In *New York*, Justice O'Connor's majority opinion stated that the federal structure exists for the benefit of individuals, not of the federal or state governments: "the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself." 505 U.S. at 181. It is unclear, however, whether this opinion is indicative of anything

formalistic way in which it has shaped the question.

2. *The Excesses of the Formalistic Analysis: Congressional Discourse*

While this formalistic, structural approach hampers the Court's ability to define adequately the contours of federalism, a similar flaw pervades the congressional arena, where the focus on the issue of shifting power between the federal and state levels obscures the underlying policy concerns being addressed. This emphasis on federalism's form rather than on its substance has effectively negated any precise discussion or determination of how to rebalance the federal-state relationship to achieve federalism's underlying goals.[68]

The formalistic approach, which has generally caused the Court to identify rigidly defined spheres of state and federal activity, has had the opposite effect in the public policy arena: enabling all manner of inconsistent policies to find justification under the federalism banner, as the formalistic federalism analysis provides no rationale for discriminating among these policies. For example, consider how a primary focus on the need to shift power between the federal government and the states has been used recently to justify two potentially inconsistent proposals: elimination of unfunded federal mandates, and implementation of flexible block grants.

The argument behind unfunded mandates[69] is direct: federal government policies should not impose costs on state and local governments. The central concern is not so much limiting the federal government's ability to regulate, as ensuring that the federal government pays for that regulation. The federal

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more than an expedient justification for a holding that could not be justified under a more state-centric view. Indeed, the facts of *New York* (in which the State of New York had consented to the legislation struck down by the Court as violative of State sovereignty) required this new rationale to support the holding. More recently in *Thornton*, O'Connor was one of four justices to join the dissent authored by Justice Thomas that re-emphasized a more formalistic approach to the state role in the federal structure. And the *Seminole Tribe* decision placed Justice O'Connor and the Court firmly back in the formalistic camp.

67. Justice O'Connor herself has struggled to determine whether to look at self-sufficiency (South Carolina v. Baker, 485 U.S. 505 (1988) (O'Connor, J., dissenting); autonomy (*Garcia*, 469 U.S. 528 (1985) (O'Connor, J., dissenting)); how a state defines itself as a sovereign (*Gregory*, 501 U.S. 452 (1991); or other aspects in the analysis.

68. *See* Andrew Cuomo, *HUD is Putting its Own House in Order*, WASH. POST, Feb. 4, 1996, at C3 (stating that current congressional approach to federalism effectively diverts attention from underlying budgetary and policy goals).

69. As with federalism as a whole, it is far easier to take a position on mandates than it is to define them, as "[t]here is no universally accepted definition of a federal mandate and surprisingly little consensus on the matter." ACIR, FEDERALLY INDUCED COSTS AFFECTING STATE AND LOCAL GOVERNMENTS, Sept. 1994, at 3 (emphasis deleted) [hereinafter ACIR-SEPT. 1993]. This variety of possible definitions of unfunded mandates is reflected in disagreement about how many such mandates exist. A recent study by ACIR identified 36 statutory mandates while the National Conference of State Legislatures has counted 185. The United States Conference of Mayors has been quoted as identifying 85 unfunded mandates related to toxics alone enacted between 1988 and 1992, *see* Paul Gillmor & Fred Eames, *Reconstruction of Federalism: A Constitutional Amendment to Prohibit Unfunded Mandates*, 31 HARV. J. LEGIS. 395, 397 (1994), while a recent inventory counted 439 explicit federal preemption statutes, *see* ACIR-SEPT. 1993, *supra*, at 3.

block grant/grants-in-aid question, however, turns the unfunded mandates issue on its head. Here, there is no question of costs being imposed. The question is the extent to which the federal government, having avoided an unfunded mandate, should impose any conditions on the funds it provides. The end of the unfunded mandates issue (e.g., reimbursement for the mandates) is precisely the starting point for the grants-in-aid issue, which looks instead at the extent to which states and local governments are hampered by federal conditions that accompany federal aid, estimated at $226 billion in FY95.[70]

The fundamental arguments against imposition of unfunded mandates actually undercut the argument for block grants. Opposition to unfunded mandates is based on two related principles: those responsible for spending funds should be required to raise the revenue needed; and the same government that defines the policy objective should be the one that pays for it. Each of these principles, however, argues against block grants, which enable states and localities to spend funds and establish many program objectives without being required to raise the money to support them.[71] Enactment of block grants with virtually no strings attached would merely recreate unfunded mandates with the levels of government transposed, with state priorities determining how federal revenues are spent, rather than the reverse.[72]

The focus on the form of the federal relationship rather than its substance

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70. The grants-in-aid issue can be framed in terms of the split between block grants and categorical aid programs, or the underlying fragmentation of categorical grants, which hamper local flexibility in addressing issues comprehensively. *See* ACIR, CHARACTERISTICS OF FEDERAL GRANT-IN-AID PROGRAMS TO STATE AND LOCAL GOVERNMENTS: GRANTS FUNDED FY 1995, JUNE 1995; ACIR, FEDERAL GRANT PROFILE 1995: A REPORT ON ACIR'S FEDERAL GRANT FRAGMENTATION INDEX, SEPT. 1995.

There is evidence that the Court interprets the grants-in-aid issue differently from Congress. In Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), the Court looked to all grants (both categorical and block grants) as evidence of states' ability to garner support from the federal government. The existence of numerous separate programs to address specific issues was alluded to by the Court as evidence of federal responsiveness to state concerns, not as an example of the burdensome nature of categorical programs. *See Garcia*, 469 U.S. at 553.

71. One of the few to make this argument is Clint Bolick, Vice President and Director of Litigation for the Institute for Justice, an organization dedicated to litigating against perceived encroachments of the regulatory welfare state: "The worst means of devolution is block grants with no strings attached. Block grants without strings separate funding responsibility, which remains with the federal government, from spending power, which is transferred to state bureaucracies. . . [D]evolving federal programs in their entirety to the states is preferable to block grants, for then the states will bear the financial consequences of the decisions they make." Senate Hearings, *supra* note 6, at 49.

72. Block grants with absolutely no strings attached would conflict with the approach taken to unfunded mandates in another way. Congress has already passed (and President Clinton has signed) legislation to curb the practice of imposing unfunded federal mandates on state and local governments. Under the terms of the Unfunded Mandates Reform Act of 1995, codified as amended 2 U.S.C. 1503, Pub. L. No. 104-4, Mar. 22, 1995, several categories of federal regulation are specifically excluded from coverage under the Act, including federal regulations that enforce constitutional rights of individuals, that establish or enforce statutory rights against discrimination, that require compliance with accounting and audit procedures, etc., *id.* § 4. It would be illogical to take the position that the federal government can impose these mandates without reimbursement, but cannot impose them with reimbursement (e.g., as a condition of a federal grant).

also diverts attention from the underlying policies being pursued. The argument no longer focuses on how to address the underlying issues, but rather on the necessity of shifting power, which will then presumably remedy the particular problems identified. This approach effectively masks significant internal inconsistencies between the federalism proposed in rhetoric and that implemented in reality. For all the talk of decentralization, for example, both Nixon and Reagan increased the federal role in government, while the current congressional approach would do the same in numerous areas.

Nearly one-half of the thirty-six major statutes regulating state and local governments from 1931 through 1980 were enacted under Nixon,[73] while both Nixon's block grants and general revenue sharing had a further centralizing effect: by bringing federal aid to numerous communities for the first time "the new federalism actually became the vehicle for conveying some forms of federal influence more deeply into American society than ever before."[74] Ronald Reagan also presided over an expansion of federal authority: of ninety-two statutes approved by Congress from 1981 through 1988 which preempted state law, Reagan vetoed only two, and of those only one (the National Appliance Energy Conservation Act of 1986) was vetoed on preemption grounds.[75] In addition, Reagan favored centralization of authority in situations where federal policies either deferred more clearly than state policies to private markets (e.g., uniform trucking standards) or advanced the conservative social agenda (e.g., attempting to mandate workfare programs and force change in state and local affirmative action policies).[76]

While the Contract with America called for "the end of government that is too big, too intrusive, and too easy with the public's money,"[77] it remains ironically a big government document.[78] As a recent analysis by the Brookings Institution pointed out, the Contract does not decrease the federal role in many areas where in the 1950s the federal government did little or nothing.[79] In fact, the same Congress has also proposed bills to add new

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73. ACIR, REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT, AND REFORM 19-21 (1984), *cited in* ACIR, FEDERAL REGULATION OF STATE AND LOCAL GOVERNMENTS: THE MIXED RECORD OF THE 1980S, at 8 (July 1993).

74. CONLAN, *supra* note 27, at 85.

75. Joseph Zimmerman, *Federal Preemption under Reagan's New Federalism*, 21 PUBLIUS 7, 15-16 (Winter 1991).

76. *Id.* at 26; CONLAN, *supra* note 27, at 214-17; Walker, *supra* note 27, at 112.

77. Contract with America, signed by over 360 Republican Members of Congress and congressional candidates, Sept. 27, 1994.

78. BROOKINGS, *supra* note 15, at 4.

79. *Id.* at 4. Following is a partial listing of the federal legislation called for under the Contract: stronger truth in sentencing, good faith exclusionary rule exemptions, effective due process provisions, funding of prison construction and added law enforcement, tax incentives for adoption, strengthening parental rights in education, stronger child pornography laws, an elderly dependent care tax credit, a $500 per child tax credit, creation of American Dream Savings Accounts, increased national security funding, increased social security earnings limits, tax incentives for private long-term care insurance, small business incentives, "loser pays" laws, limits on punitive damages, and product liability law

strings to state eligibility for federal prison construction funds,[80] federalize wide areas of the tort law, remove state regulation of securities, and extend the federal interstate commerce power to criminalize the performance of specific late-term abortions by physicians.

This federal activism extends even to the heart of devolution itself: block grants. Like President Reagan, whose policy mixed rhetorical federalism with central direction in areas consistent with his conservative agenda, the current congressional approach speaks boldly of block grants while imposing a series of conservative limits on state flexibility to use those grants. Even the most revolutionary of the proposals, the block granting of welfare, would replace liberal federal mandates with conservative ones: the Contract calls for compelling states to impose both two-years-and-out and work requirements for welfare, as well as denial of increased AFDC for added children on welfare.[81]

To summarize, while the public policy debate has often relied on a sense of policy failure on the federal level as a rationale for shifting power to the states, it has most recently focused primary attention on making that power shift, not on how the power shift can be used to remedy the particular problems identified. The ultimate goal shifts along with the power: the goal is no longer to address poverty, but to give states' flexibility; it is no longer to alleviate distress, but rather to diminish regulation. In its desire to alter the federal/state relationship, the congressional approach has elevated issues of form and structure, thereby obscuring the underlying substantive issues and enabling federalism rhetoric to justify often disparate and inconsistent approaches.

B. *Static Approaches to Federalism*

Both the judicial and the legislative approaches have not only been limited by their structural, formalistic framework; they have also treated the federal/state relationship within a static analytical structure.

While making ritual obeisance to the need over the past half-century for a strong federal role to combat segregation,[82] the current congressional

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reform.

80. *Id.* at 14.

81. In fact, the actual bills proposed in 1995 in the House and Senate, respectively, went even further. The House bill ("The Personal Responsibility Act of 1995") would have required states to accelerate movement of welfare recipients into jobs or job training, impose a five-year lifetime limit on receipt of benefits, and prohibit payments to unmarried teen-age mothers and most legal aliens. Both the House and the Senate have also proposed to tighten eligibility under the Supplemental Security Income program, denying assistance to non-citizens and those whose disabilities arise from alcohol or substance abuse. HUGH O'NEILL & MEGAN SHEEHAN, THE IMPACT OF NEW FEDERAL BUDGET PRIORITIES ON AMERICA'S CITIES, 17 (1995) (unpublished report made available by the Taub Urban Research Center).

82. Republicans from Reagan to Gingrich have made clear that their broadly negative views of federal powers accept the federal role in ending segregation. *See, e.g., Excerpts From Gingrich's Speech on Party's Agenda for the 104th Congress*, N.Y. TIMES, Jan. 5, 1995, at A23.

approach paints with an extremely broad brush. It does not speak the language of Woodrow Wilson that each era must modify the federal-state balance, but rather speaks of centralization as an error not just for now but for earlier times as well.[83] A narrow view of states as laboratories supports this vision—they are laboratories for each other, not to test approaches that could some day be adopted nationally. The dominant congressional approach relies not on the demands of changed circumstances, but on an absolutist notion of previous error requiring repentance and reform. It does not speak of different approaches for different areas of policy, but instead lumps together developmental, allocational, and redistributive policies,[84] pursuing similar approaches in a wide range of areas. Finally, it ignores potential pressures on states (e.g., interstate competition) that may emerge once devolution occurs.[85]

Unlike Congress, the Court has recognized that the relationship between the federal and state levels of government shifts over time. In *Lopez*, the majority recognized how the growth of the national market had affected changes in the Court's interpretation of interstate commerce,[86] and Justice O'Connor's dissent in *Garcia* spoke of the need for "the Court to enforce affirmative limits on federal regulation of the states to complement the judicially crafted expansion of the interstate commerce power."[87] Indeed, one of the stated reasons for the abandonment of the traditional governmental functions analysis was a sense that it was too static, restricting states' ability to move into non-traditional operations.[88]

While the Court has recognized the changing nature of the federal-state relationship over time, it has ignored an equally important dynamic: the role that the Court's decisions play in changing that relationship. The *Garcia*

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83. *Blueprint for America*, *supra* note 24, at 20.

84. *See* William Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1357 (1994) (providing description of Paul Peterson's theory distinguishing among these types of policies); *see also* PAUL PETERSON, THE PRICE OF FEDERALISM (1995).

85. Senate Hearings, *supra* note 6, at 20; House Hearings, *supra* note 6, at 25.

86. 115 S. Ct. at 1628.

87. 469 U.S. at 587. Even recognition of this dynamic has not been consistent. Justice O'Connor's proffered "mirror image" analysis (arguing that the inquiries regarding whether a power is (a) delegated to Congress in the Constitution; or (b) an attribute of state sovereignty reserved by the Tenth Amendment are mirror images of each other) fails to reflect this dynamic nature of federalism. While the "mirror image" analysis explains that a power cannot fall simultaneously under the interstate commerce clause and the Tenth Amendment reservation, it does not illuminate the grey areas in between (e.g., areas that may in the future legitimately fall under the commerce clause without impinging on State sovereignty interests). If such a grey area exists, then the analysis fails to aid the inquiry. If such a grey area does not exist, then the expansion of the interstate commerce power over the past two centuries would imply a corresponding contraction of the powers reserved under the Tenth Amendment, an argument that no one has made. O'Connor's dissent in *Garcia* contemplated precisely the opposite dynamic, one in which the Court was required "to enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the Interstate Commerce Clause." 469 U.S. at 587 (O'Connor, J., dissenting).

88. 469 U.S. at 543-44.

approach is based on a notion that the Court can be a passive observer of federalism. In this context, however, inaction is an illusion; even a strict *Garcia* court would shape, through its other decisions and its silence, the very national political process on which the Court relies.

This dynamic occurs on several levels. First, to the extent that certain avenues of congressional power are closed off by the Court, other avenues become more heavily trafficked. Congress altered the mechanism for obtaining state enforcement of national restrictions on motor vehicle air pollution in response to *NLC*.[89] When the Court made clear in *South Dakota v. Dole*[90] that conditions on federal grants-in-aid represented a constitutional tool for regulating state behavior, it thereby gave Congress an additional incentive to spend.

Second, Court decisions actually change the weight of various interests in the national political process. Consider the Court's Dormant Commerce Clause jurisprudence in this regard. This jurisprudence shapes congressional willingness to strike down economic protectionism through preemption, as Congress knows that the most egregious problems will be addressed by the Court. In this way, the Court actually encourages the congressional silence on which it has come to rely. More importantly, the Dormant Commerce Clause significantly changes the politics of state relations with Congress. Since states can rely on the Court to strike down economic protectionist legislation of neighboring states, they can save their political "chits" with Congress for other concerns. In fact, the Court's activist approach to the Dormant Commerce Clause thereby gives states a greater ability to present a united front to Congress on issues that truly threaten states qua states. They do not need to waste their time and energy opposing each other on subsidiary issues.[91]

Third, the mere seeking of redress from the Court itself affects the national political process. Consider the Court's holding in *New York*, where Justice

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89. D. Bruce LaPierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U.L.Q. 779, n.23 (1982).

90. In South Dakota v. Dole, 483 U.S. 203 (1987), the Court upheld a federal statute directing the Secretary of Transportation to withhold a percentage of otherwise allocable federal highway funds from States that permit the purchase or public possession of alcohol by persons under 21 years of age. The Court held that the Tenth Amendment "limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants." 483 U.S. at 210.

91. The Dormant Commerce Clause jurisprudence also gives Congress the gift of time: it can focus on national issues, without expending time on local economic matters. Ernest Brown, *The Open Economy: Justice Frankfurter and the Position of the Judiciary*, 67 YALE L.J. 219 (1957). One could argue, in fact, that by removing from Congress the necessity to strike down protectionist state economic regulations, the Court has in fact given Congress more time to expand its reach in other areas. As Redish and Nugent have noted, Dormant Commerce Clause decisions also change the value of inertia—as states no longer need to put together a congressional coalition to stop the protectionism of their neighbors. Martin Redish & Shane Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569. And, indeed, one could surmise that without an activist court in this regard, different states would be differently affected, thereby causing some states to use more "chits" than others in Congress to prevent threatening local regulations.

O'Connor was particularly concerned about the accountability of each level of government for its actions. Commandeering a state's legislative processes would have undercut this accountability. Yet, ironically, the opposite outcome would also have made accountability clear. If the Court had upheld the Low-Level Radioactive Waste Policy Amendments Act, New York would have proven its case: it had no choice but to move ahead in finding and regulating hazardous waste sites. The Court's simple confirmation of that reality would have clarified the accountability of Congress in a very public fashion.

C. *The Misperceived Role of States*

The approaches of both the Court and Congress seriously misdiagnose the role of states, reflecting once again their greater concern for the structure of federalism in theory than for its impact in reality. This has led to a tendency for the congressional approach to ignore state weaknesses, for the Court to ignore the difficulties of fitting late twentieth-century American states into an eighteenth-century framework, and for both to conflate the role of states and localities.

1. *State Weaknesses*

Unlike previous proposals, the current congressional approach places tremendous faith and resources in the hands of the states. This confidence in the states is perplexing in several regards. First, it ignores the problem of bureaucracy at the state level, where the state bureaucracies are in the aggregate both far larger than the federal bureaucracy and often less subject to public scrutiny. In fact, there has been a significant growth in the size of state and local governments, while the size of the federal government has been decreasing.[92] Even if one looks at relative responsibilities rather than number of employees, the story is similar. As federal responsibilities have increased, so too have the roles of state and local employees.[93] Indeed, the generic bureaucrat implementing federal policies is most likely to be a state or local employee: "Contrary to popular myth, most federal policies are not carried out by pointy headed bureaucrats in Washington, or even those in the field, but by

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92. While the number of federal civilian workers fluctuated between 2.2 and 3.2 million from 1960 through 1990, there are now 2.08 million federal employees, of whom only 11% work in Washington. This is in comparison to 15 million current state and municipal employees. BROOKINGS, *supra* note 15, at 15-17.

93. EUGENE DVORIN & ARTHUR MISNER, GOVERNMENTS WITHIN THE STATES 80 (1971). Harvey Mansfield has confirmed that "states and municipalities have found more and more to do, notwithstanding the great growth in national functions," HARVEY MANSFIELD, THE 50 STATES AND THEIR LOCAL GOVERNMENTS 105 (James Fesler ed., 1967), while Thomas Dye has stated that "[t]he growth of power in Washington has not necessarily meant a reduction in the powers of state and local governments— in fact, all governments have vastly increased their powers and responsibilities in the twentieth century." THOMAS DYE, POLITICS IN STATES AND COMMUNITIES 44 (4th ed. 1991).

state and local government officials who exercise a considerable degree of discretion and autonomy in spending federal funds."[94]

Clint Bolick of the Institute for Justice has argued that

> as measured by the relative size of civilian bureaucracies, state and local governments are five times larger than the federal government—and the gap is widening, even before devolution . . . . [S]tates have bureaucracies too. And they are just as susceptible to capture and undue influence by special interests bent on preserving a status quo that inures to their self-interest; perhaps even more so. . . . It would be an empty revolution indeed if a massive, unresponsive federal welfare apparatus was merely supplanted by fifty massive, unresponsive state welfare apparatuses.[95]

Further, this state-centric approach minimizes other state weaknesses like the threat of factions, a central concern of the Founders and still a concern in the Court's analysis of federalism issues.[96] The Framers perceived the federal government as the best protection against the tyranny of factions, not the states: "The influence of factious leaders may kindle a flame within their particular states but will be unable to spread a general conflagration through the other states."[97] Studies by political scientists have found evidence of such factions on state and local levels.[98]

2. *Distinctions Between States and Localities*

While the congressional approach ignores state weaknesses, both approaches conflate the roles of states and localities. For purposes of its Tenth Amendment holdings, the Court makes little distinction between state functions and local functions. In fact, the examples used in *NLC* (police, fire, sanitation, public health, and parks and recreation)[99] are functions implemented primarily by localities rather than by states. And Justice Powell's dissent in *Garcia* spoke of such locally directed activities as street maintenance, public lighting, traffic, water, and sewerage.[100] As Richard Briffault has noted, while holdings in

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94. MICHAEL RICH, FEDERAL POLICYMAKING AND THE POOR 7-8 (1993).
95. Senate Hearings, *supra* note 6, at 47-48.
96. *See* THE FEDERALIST Nos. 10, 51 (James Madison) (Clinton Rossiter ed., 1961).
97. *Id.*, No. 10, at 84. One can make a cogent argument that the administrative bureaucratic state has changed this equation, as federal agencies have been captured by national interest groups that have divided power among themselves rather than counterbalancing each other. For further discussion of this point, see Richard Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335 (1990). However, this approach would argue for changing the nature of the command and control system, not merely shifting the bureaucracy to the state level.
98. RICH, *supra* note 94, at 215-17.
99. 426 U.S. at 851.
100. 469 U.S. at 578.

NLC and *Garcia* focused on state responsibility, the activities discussed were all local.[101] A decade later the reigning approach remains one of lumping together states and localities for purposes of determining the reach of Tenth Amendment protection to the states.

Similarly, although recent congressional rhetoric has stressed the importance of local decision-making, specific proposals have overwhelmingly sought to transfer power to the states. While Speaker Gingrich has at times identified devolution to the states as merely a first step toward devolution to localities and then ultimately to the people,[102] recent proposals have devolved federal power no further than state capitols. Unlike revenue sharing, which split funding evenly between states and municipalities,[103] a wide range of new block grants is intended to provide resources solely to the states. Not only has the congressional majority proposed to convert individually-based entitlements into block grants to the states, but the argument has been framed very much in terms of providing the flexibility state officials need.[104] Locally elected officials have been largely excluded, so much so that in November, 1995 local government officials representing the U.S. Conference of Mayors, the National Association of Counties, and the National League of Cities felt compelled to insist that they be included in national federalism discussions.[105]

3. *Changed State Roles*

A further element of the misperceived role of states is potentially even more serious. In considering the bounds of the federal/state relationship, both sides of the Court debate consistently hearken back to the adoption of the Constitution and the Federalist Papers. This overlooks a vital fact: the states no longer play the role in today's polity that they did at the time of the Founders. In 1790, the largest population of any state was Virginia's 692,000. Today 14 cities and 60 counties are at least that large.[106] During the time of

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101. Richard Briffault, *What About the "Ism"? Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1328-35 (1994).

102. "[W]hat we really want to do is to devolve power all the way out of government and back to working American families." GINGRICH, *supra* note 26, at 105.

103. CONLAN, *supra* note 27, at 67.

104. Senator Snowe: "Block grants give state and local governments the flexibility they need." Senate Hearings, *supra* note 6, at 5. Michigan Governor Engler: "These cumbersome rules are barriers . . . that restrict States from helping families who are trapped in poverty." Senate Hearings, *supra* note 6, at 12. Massachusetts Governor Weld: "It's time for President Clinton to allow the states to give it our best shot." Governor William Weld, *Release Us From Federal Nonsense*, WALL ST. J., Dec. 11, 1995, at A12.

105. As columnist Neal Peirce described it: "All year long, the officials complained, they've stood by helplessly as Congress, with scarcely a word of consultation, prepared deep cuts in programs vital to them and their communities." Neal Peirce, *Local Governments Cry Out for a Policy Voice*, BALTIMORE SUN, Nov. 27, 1995, at 11A.

106. U.S. CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES (1975); 1995 COUNTY AND CITY EXTRA (Courtenay Slater & George Hall eds., 1995).

the Founders, the states had little competition from cities or counties, as their legal structures had not yet been determined; and Home Rule for local governments was a century away. In 1992, by contrast, there were 86,743 local governments, the vast majority of which were located in the 48 states that provide Home Rule.[107]

Beyond the numbers, the facts, and the figures is the reality of people's affections and attachments. The Founders' world was one in which states were true centers of attachment and loyalty; and in which the distinctions between state populations were dramatic. It was the very force of continued state loyalty that had made the Articles of Confederation unworkable. Madison assumed it to be "beyond doubt that the first and most natural attachment of the people will be to the governments of their respective states."[108] And, indeed, at that time, the United States "looked a lot more like Western Europe. State citizenship was an important constituent of individual identity . . . . Antebellum descriptions often refer to 'these' United States."[109] In addition, in the eighteenth century:

> geographical boundaries matched a variety of functional divisions in the society fairly well: religious groups formed their own communities, one branch of a family often resided near other branches, and economic activities were grouped in specific areas.[110]

We have become instead a single nation, as "American political culture is every inch a national culture."[111] Not only do Americans look to the federal government to solve problems ranging from civil rights to strengthening the economy and setting health and safety standards, but in the last five years of the 1980s alone, 21 million Americans migrated between states. By 1990, only 61.8% of Americans resided in the state where they were born.[112] This migration, together with the Civil War, development of mass media and emergence of a national culture, the growth of public education, the central place of the United States in world politics, war,[113] the expansion of universally protected civil rights, and other factors, have together changed the face of the states. Cultural differences no longer match geography,[114] and on very few issues are states of one mind.[115] "While the states are units of political

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107. ACIR-OCT. 1993, *supra* note 61, at 7.
108. THE FEDERALIST No. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961).
109. Kramer, *supra* note 2, at 1557.
110. Mark Tushnet, *Federalism and the Traditions of American Political Theory*, 19 GA. L. REV. 981, 994 (1985).
111. BROOKINGS, *supra* note 15, at 6.
112. *Id.* at 6-7.
113. Kramer, *supra* note 2, at 1557.
114. Tushnet, *supra* note 110, at 994.
115. Rubin & Feeley, *supra* note 3, at 948.

organization, few of them are any longer communities in the social or sociological sense. . . . [T]heir citizens do not share many common interests as such, or acquire a distinctive common outlook."[116] The shift of attachment to America as a nation has been profound. It is reflected in the relative lack of development of most state constitutionalism,[117] the imperfect match between geography and function,[118] the turning toward the national government to address a wide range of problems,[119] and the relatively high levels of normative consensus through American culture.[120] It is further evidenced by the fact that "[s]entiments of patriotism and community in this country are reserved for the Union rather than the states,"[121] and is reinforced with every playing of the Star-Spangled Banner by high school bands at small-town basketball games throughout the land.[122] Is it any wonder that the Court must struggle to determine what about states is worth protecting under a Constitution written at a time when states played a fundamentally different role?

D. *Citizens' Role Outside the Analysis*

Finally, both the judicial and congressional approaches ignore the crucial role of citizens in the federal system. These analyses dwell on the relationship between levels of governments, not between government and the governed. While congressional leaders speak of ultimately giving citizens a greater voice, they have in fact chosen to transfer resources to the states, which have often been the least accessible, representative, or accountable of all levels of government.[123] While the Court's analysis has taken some tentative steps toward a more citizen-based approach with its new emphasis on accountability,[124] the underlying approach is still one of overriding concern for state sovereignty.

The arguments of those who attempt to find an "informal basis" for the Court's reliance on the more "formal" structural protections of states in the Constitution illustrate the problem.[125] First, many of these informal relation-

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116. MANSFIELD, *supra* note 93, at 113.

117. Gardner has argued that "the tension between state and national constitutionalism has been largely resolved in the modern day United States by the collapse of meaningful state identity and the coalescence of a social consensus that fundamental values in this country will be debated and resolved on a national level." James Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 828 (1992).

118. Tushnet, *supra* note 110, at 994.

119. BROOKINGS, *supra* note 15, at 6-7.

120. Rubin & Feeley, *supra* note 3, at 922.

121. MANSFIELD, *supra* note 93, at 114.

122. Gardner, *supra* note 117, at 830.

123. *See* Briffault, *supra* note 101, at 1326.

124. *See* New York v. United States, 505 U.S. at 168-69; United States v. Lopez, 115 S. Ct. 1624, 1638 (1995) (Kennedy, J., concurring).

125. While all agree that the dynamics of our political process have changed in the nearly half-century since Herbert Wechsler's seminal article *The Political Safeguards of Federalism*, there is no lack of nominees for informal processes that continue to protect the States. Herbert Wechsler, *The Political*

ships do not necessarily protect states as much as they protect the status quo. In fact, the strongest and most enduring of the informal relationships is not among elected officials but rather among bureaucracies at all levels of government, as issue-oriented groups support each other across jurisdictional lines.[126]

Second, it is questionable whether the added protection states may receive under this informal arrangement is worth the cost it imposes on other federalism values, such as responsiveness by government to the citizens. In fact, the close relationship between the federal and state levels threatens to separate government from the governed,[127] as these informal relationships have succeeded in creating a political class that cuts across the national government, states, and localities. This is furthered by a bureaucracy that establishes its own informal connections and lobbying arms across the levels of government. They speak the same language; they know each other; they protect one another. What is often missed is that this very web of relationships that defends state interests also threatens the very liberty and accountability that federalism is intended to protect. It not only blunts the competition for power between the federal and state governments, but it also threatens to create an unholy alliance between the levels of government, in which each benefits from blurring lines of responsibility and the major political divide lies between government and the public, rather than between different levels of government. As Richard Stewart has pointed out, this bureaucratic state has created "Madison's Nightmare" in which factions, rather than competing for power on the national level, divide it among themselves.[128] Thus the picket-fence

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Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954). Laurence Tribe has explained how the need to create legislative coalitions acts to limit the reach of congressional enactments. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-7, at 314 (2d ed. 1988). LaPierre has found protection for states through two limitations: the impact of national policy on private activity and the imposition of the administrative and financial costs of enforcing national policies on the national electorate. D. Bruce LaPierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982); *see also* D. Bruce LaPierre, *Political Accountability in the National Political Process- the Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577 (1985). Larry Kramer has posited essentially a four-pronged series of protections based on: (a) nonprogrammatic and non-centralized political parties; (b) the rise of an administrative bureaucracy; (c) the continued existence of states which encourages political movements to develop along state lines; and (d) the structure of the political culture. *See generally* Kramer, *supra* note 2.

126. This picket-fence federalism (in which there are separate ties among the governmental levels across a wide range of issue areas) is strengthened by the fact that numerous federal programs are now implemented by states and municipalities. BROOKINGS, *supra* note 15, at 17. This local responsibility for program administration often brings with it substantial federal funds to offset administrative costs and support staff costs. Indeed, the real Washington bureaucracy is made up of the people in private firms, and state and municipal agencies that are funded by federal dollars. *Id.* at 15.

127. These relationships also threaten to blur political accountability far more than the federal intrusion into traditional areas of state operations that so worried Justices Kennedy and O'Connor in *Lopez*.

128. Stewart, *supra* note 97, at 342.

federalism to which legal commentators have pointed as providing pragmatic protection for federalist values may undermine the central role of citizens and accountability of government to the electorate.[129]

III. TOWARD A NEW PARADIGM

This Part suggests steps toward a new paradigm of federalism which would address the shared weaknesses outlined above. This improved paradigm would: (a) recognize the role of federalism as an instrumental value in a dynamic process, focusing more explicitly on the desired outcome, rather than the formal process or power relationship; (b) in this context, consider more realistically the instrumental role currently played by states within the federal system; (c) reflect the extent to which local governments fulfill many of the values of federalism which are often attributed to states; and (d) incorporate the role of citizens more directly into the analysis.

A. *A Dynamic Instrumental Federalism*

How can we construct a paradigm that reflects both the instrumental values of federalism and its dynamic nature? When applied to the judicial analysis, this paradigm would recognize that the question is not whether the Court removes itself from the federalism debate, but rather how it intervenes. Even a strict *Garcia* Court would still shape the dynamics of federalism in its other decisions, whether related to the Dormant Commerce Clause or to strengthening individual rights (which structures the extent to which states must compete with individuals and other players in the national process for congressional attention) or to deciding the reach of equal protection claims (which can in the reapportionment cases, for example, determine the extent to which congressional districts represent homogenous groupings or whether such groups need to seek other avenues to power in the national political process). Thus, the question should not be whether to intervene but rather what values the inevitable Court interventions should further.

In this new paradigm, federalism and the Tenth Amendment would be perceived as additional means by which to achieve the Constitution's underlying values of freedom and liberty. Such an approach would find support in Madison's argument that the Revolution was fought not for the states but for the people:

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129. Furthermore, if congressional efforts succeed in replacing categorical programs with more consolidated funding streams, it will ironically threaten to undermine the very relationship on which legal analysis has relied, as the informal relationships among each level of government related to specific program areas (e.g. connections among environmentalists or housing administrators across governmental levels) will diminish accordingly.

> Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual states, that particular municipal establishments, might enjoy a certain extent of power and be arrayed with certain dignities and attributes of sovereignty?[130]

This approach would also build on Justice O'Connor's refusal to permit the states to consent to inappropriate limitations on their power,[131] thereby recognizing that federalism exists for the benefit of the people, not of the states. And it would find support in the Court's ruling in *Dennis v. Higgins*, that suits for violation of the Interstate Commerce Clause may be brought by individuals as a "right, privilege, or immunity" protected by Section 1983.[132]

Under this paradigm, rather than focusing on federalism as a separate issue, the Court would view federalism questions as part of a larger structure of individual rights protection, separation of powers, judicial review, and other instruments that are all intended to protect individual liberty and freedom. A decision in any one of these arenas affects the playing field in the others, and the balance of federalism is affected, in turn, by the status of the other pieces of the puzzle.

This new approach would also serve to restructure the public policy debate. Rather than focusing on federalism as an end in itself, the public policy approach should see federalism as an instrument to improve both governmental performance and local participation. In this context, it would not suffice merely to transfer federal responsibilities to the states. The goal is not to empower state governments, but to address problems such as poverty, urban distress, and housing that have vexed literally thousands of governments across all levels. Indeed, if the simple devolution of responsibility were the answer, then areas that have long been traditional state and local governmental functions, such as education and crime control,[133] could now be held up as shining examples of success. The history of block grants also supports the contention that more dramatic steps are needed to change the dynamics of the bureaucratic system, rather than merely transferring these bureaucracies to the states. The General Accounting Office has reported that even after block grants are created, if the underlying system does not change, it is only a matter of time before those

130. THE FEDERALIST No. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961).
131. *See* New York v. United States, 505 U.S. 144 (1992).
132. 498 U.S. 439 (1991).
133. See the mention of education and police power in *Lopez*, 115 S. Ct. at 1632.

block grants become "re-categorized."[134]

Thus, the new focus should not be on how much power gets devolved, but on the outcome that devolution is intended to achieve. This argues not for giving states block grants with no strings attached,[135] but rather for entering into partnerships among all levels of government to achieve specific results. Funds would be provided directly to states and localities based on need and performance. Bonuses for good performance could be combined with sanctions for non-performance based on national objectives as applied to local circumstances. This approach would provide local governments with the flexibility they need in order to tailor programs to local circumstances, while ensuring accountability for the results. As David Osborne has argued: "Block grants are blind to performance. They shower as much money on wasteful, ineffective programs as they do on innovative, cost-effective approaches."[136]

This paradigm would build on the progress already made as part of the Clinton Administration's initiative to reinvent government and the proposed Local Flexibility Act introduced by two Republicans, Senator Mark Hatfield of Oregon and Congressman Christopher Shays of Connecticut.[137] It would focus on product rather than process, performance rather than regulation, and partnership rather than bureaucracy. It would recognize that the problems that need to be addressed are so complex that they cannot be resolved by one level of government acting alone; rather, they require cooperation among all levels.

This paradigm would take the separate arguments that have been conflated into the general congressional approach and deal with each in turn. If the problem is that states and local governments are not given flexibility to implement innovations, flexible block grants that identify specific outputs and reward performance could act as a remedy, thereby truly giving a premium to the most innovative and efficient. If the problem is that separate programs require local governments to address problems in an isolated rather than comprehensive fashion, local governments should be able to create comprehen-

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134. In nine block grants from FY83 through FY91, Congress added new cost ceilings and set-asides or changed existing ones 58 times. GOVERNMENT ACCOUNTING OFFICE, BLOCK GRANTS: INCREASES IN SET-ASIDES AND COST CEILINGS SINCE 1982 (HRD-92-58FS, July 27, 1992), *cited in* GOVERNMENT ACCOUNTING OFFICE, BLOCK GRANTS: CHARACTERISTICS, EXPERIENCE, AND LESSONS LEARNED 11 (HEHS-95-74, Feb. 1995).

135. Nebraska Senator Exon has described the waste that no strings attached aid can engender: "It was about 20 years ago now, I guess, in the early 1970s that I [as Governor of Nebraska] received a multi-million dollar check in the mail one day from the Federal Government under the revenue-sharing concept. We did not need the money, but it was a nice thing to have, like a Christmas bonus, so to speak." Senate Hearings, *supra* note 6, at 2.

136. David Osborne, *A Federal Challenge for Local Ingenuity*, WASH. POST, June 1, 1995, at A23.

137. Under the Act, localities would develop "flexibility plans" that would describe overall strategic goals and how federal funds are to be used to achieve them. The plans would also include requests for waivers of statutory provisions in specific programs hindering implementation, and a federal governmental board would be authorized to approve such waivers. S.88/H.R.2086, 104th Cong., 1st Sess. (1995).

sive plans and be given the flexibility to pool various sources of funds to implement them.[138]

To the extent that the problem is bureaucracy and paperwork, then the answer is not shifting bureaucracy to the state or local level, but rather restructuring the entire command and control relationship. This can be achieved through the creation of partnerships among the various levels of government, with defined output and performance measures. Bureaucratic regulations would be replaced with clearly defined national goals, and localities would be free to determine how they are to meet those goals. Local strategies would identify clear measures of what they intend to achieve, and actual performance could be compared with these promises. Good performers would receive bonus funding; and actual performance would be publicized, so that the most innovative approaches were identified and shared.[139] These partnerships would help address one of the frequently ignored problems of the current structure:

> Washington has had, and continues to have, tremendous difficulty in executing even relatively straightforward policies precisely because state and local governments enjoy such wide latitude in deciding how best to translate federal policies into action, or whether, in fact, to follow federal policies at all.[140]

These partnerships would be more revolutionary than the alternatives currently under consideration by Congress. They would allow not just for a series of individual block grants, but for flexibility across all federal grants. First, states and localities could request statutory waivers that would enable them to pool money from different block grants if such flexibility is needed to implement coordinated strategic plans. Second, the focus on partnerships among the federal government, state government, and each municipality would increase accountability by elected officials, as interests of separate bureaucra-

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138. Such a process is already underway. The Clinton Administration's Empowerment Zones initiative created a competition for funding based on locally-developed comprehensive strategic plans. Designated areas received both added federal funds and waivers to implement their plans. Similarly, Andrew Cuomo, Assistant Secretary at HUD, has consolidated twelve separate planning, application and reporting requirements into a single consolidated plan. This enables localities to coordinate their community development, economic development, affordable housing, and homelessness expenditures based on local strategies, thereby cutting across separate program divisions and enabling local needs to drive resource availability rather than the reverse.

139. *See generally* HUD REINVENTION: FROM BLUEPRINT TO ACTION, U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT (Mar. 1995) (describing how such performance block grants, proposed by HUD Secretary Henry Cisneros, could work in areas of community and economic development, and affordable housing); *see also* BLUEPRINT II, RENEWING AMERICA'S COMMUNITIES FROM THE GROUND UP: THE PLAN TO CONTINUE THE TRANSFORMATION OF HUD, U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT (1996).

140. BROOKINGS, *supra* note 15, at 18.

cies become subordinate to each locality's single strategic plan.[141] And this would apply to state and local governments the same principle often so eagerly applied to individuals on welfare: there is no such thing as an entitlement; resources are to be based on proven performance.

B. *A New Understanding of the Role of States*

This paradigm suggests a new approach to viewing the role of states in the American polity. Since states no longer play the role anticipated by the Founders, it makes little sense to treat them as if they were still loci of citizen attachment and loyalty. States now play a different role: they help structure stability in an era of robust individual rights. Their current value lies not in their role as a focus of citizen loyalty and identification, but rather in the fact that they do not play that role. That is, the success of today's federalism may reside in the fact that it represents a structure that is contrary to that envisioned by the Founders, as citizen attachment is to the nation rather than its component states.

It is possible that America has managed to maintain stability even in an era of robust individual rights precisely because the divisions that define our political structure (i.e., states) do not coincide with the divisions that define our social and cultural structure (e.g., racial and ethnic groups and economic and national interests). We are able to maintain national unity while giving free rein to subnational groupings at least in part because those subnational groupings are not coincident with state (or city) boundaries.[142] In other words, we have created a system in which the fault lines of the affective community[143] do not coincide with the fault lines of the political community.[144] And the continued

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141. Mayors generally do not get involved in detailed plans for spending federal dollars in a single program. They leave that to the civil servants or to commissioners, each of whom represents a specific policy constituency. They would, however, be closely involved in producing a single comprehensive plan for their communities.

142. This increasing group identity is a function of factors such as technological advances that have made possible the growth of national interest groups, the bureaucratic structure of picket-fence federalism, increased individual rights, and government benefits distributed on the basis of group membership. For more information regarding the governmental benefits issue, see Robert Samuelson, *Great Expectations*, NEWSWEEK, Jan. 8, 1996, at 31.

143. In this context, the term "affective community" refers to an individual's personal and emotional ties as well as his perceived identification of common interest with a group. While Rubin and Feely use the term "affective community" slightly differently, they too speak of federalism's ineffectiveness in securing an affective community. *See* Rubin & Feeley, *supra* note 3.

144. This circumstance has far-reaching implications. First, it points to the inapplicability of the American federal system to international arenas such as Bosnia. If the Bosnians were to structure a federal system along American lines, that system would need to divide the federation, not into Bosnian, Croatian, and Serb portions, but rather into states whose boundaries do not coincide with those separate ethnic groupings. Closer to home, it raises interesting approaches to analyzing the appeal of race-based congressional districts. Should they be promoted on the grounds that the protection afforded by federalism of geographically-based groups should also be extended to race-based groups? Or should they be avoided on the premise that it is preferable for political divisions not to coincide with ethnic or cultural divisions? Or is it appropriate to make a distinction between congressional representatives

existence of those political divisions may enable American society to expand individual rights and freedom while still maintaining union and stability. Thus, under this scenario, states should be protected not because they are more responsive to local preferences or because like-minded people tend to move to the same state, but because neither of these truly reflects current reality.

C. *Distinctions Between States and Localities*

As indicated above, the federalism paradigm needs to recognize the fact that states now play a new role in our polity, helping to secure stability in an otherwise fractured melange of individuals and groups. Similarly, a new paradigm should reflect the fact that while the nation has replaced the states as the locus of attachment and loyalty, other aspects of the states' former role are now filled by localities.

Thus "the 'states' that were protected by *National League of Cities* are not the same as the entities the framers had in mind, even though the geographic borders of some of them have not changed since 1789."[145] Not only do cities and counties perform today many of the responsibilities that states performed two hundred years ago, but their size is also far more consistent with the size of the Framers' states. Los Angeles County's spending now exceeds that of 32 states, Chicago's more than 12 states, and New York City's more than 48 states,[146] and many city leaders are better known in the political arena than are the governors of their states.[147]

1. *Judicial Recognition of Localities*

As indicated above, Court decisions have recognized the key role of localities without explicitly saying so. This is particularly true when one considers the federalist values of local decisionmaking, citizen participation, and responsiveness to diverse community needs, all of which occur far better on the municipal than on the state level. Justice Powell's dissent in *Garcia* noted that "[t]he Framers recognized that the most effective democracy occurs at local levels of government, where people with firsthand knowledge of local problems have more ready access to public officials responsible for dealing with them."[148]

Certainly, the Court's jurisprudence in this area must be constrained by the

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(which perhaps should represent "affective" communities) and states which should not? *See* James Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251 (1994) (analyzing tensions between geographical and ethnic groupings as well as universal rights).

145. MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 42 n.64 (1988) [hereinafter RED, WHITE AND BLUE].

146. BROOKINGS, *supra* note 15, at 9.

147. THOMAS ANTON, AMERICAN FEDERALISM AND PUBLIC POLICY: HOW THE SYSTEM WORKS 6 (1989).

148. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 575 n.18 (1985).

Tenth Amendment's explicit reference to states. However, there is room for movement.[149] The recognition in *New York*, for example, that state officials may act contrary to the interests of their citizens and that "state sovereignty is not just an end in itself" may open the door to scrutiny of action by state officials that restricts localities' freedom to pursue citizen participation and local decisionmaking that would further the values of federalism.[150]

One could also make a potential Guarantee Clause argument for the cities.[151] Such an argument would be based on two prongs. First, the Court recognized in *Texas v. White* that under the Guarantee Clause, a state is defined as "a people or political community, as distinguished from a government."[152] Second, one could look to the Northwest Ordinance of 1787, passed under the Articles of Confederation, for a recognition that the Framers conceived of local government as a key element of a republican government—even in areas that were not yet states:

> Section 7 of the ordinance authorized the territorial governor to "appoint such magistrates, and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same." The presence of 5,000 free male inhabitants in the territory triggered a right "to elect representatives from their counties or townships to represent them in the general assembly" which, when organized, was empowered to regulate and define the "powers and duties" of local officials. Territorial legislatures soon created "a fabric of local government."[153]

Although the quoted language makes clear that a state could determine the

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149. The endeavor is not limited to implementing the Tenth Amendment, but also to following "the principles of federalism implicit in the Constitution." South Carolina v. Baker, 485 U.S. 505, 534 (1988) (O'Connor, J., dissenting).

150. Admittedly, this would be contrary to a long line of cases that have stood for the opposite proposition. *See* Hunter v. City of Pittsburgh, 207 U.S. 161 (1907) (explaining that municipal corporations are created as convenient agencies of State and nature and duration of local power is at absolute discretion of State); *see also* Missouri v. Lewis, 101 U.S. 22 (1879) (holding that a State may establish one system of law in one portion of its territory, and another system in another portion). It would, however, build on the holdings of other cases. *See, e.g.*, Lawrence County v. Lead-Deadwood School District, 469 U.S. 256 (1985) (enabling local government to assert Supremacy Clause to strike down state statute restricting how locality could spend funds provided by federal government); Milliken v. Bradley, 418 U.S. 717 (1974) (finding that school district lines may not be casually ignored or treated as mere administrative convenience in establishing metropolitan-wide remedies for inner-city segregation).

151. *But see* Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988) (arguing that Guarantee Clause prevents federal government from interfering with organizational structure and governmental processes chosen by State residents).

152. 74 U.S. 700, 721 (1868), *overruled on other grounds*, Morgan v. United States, 113 U.S. 476 (1885).

153. ACIR-OCT. 1993, *supra* note 61, at 31.

appropriate powers and duties of local officials, it assumes the necessity of having sub-state governmental entities.

2. *Devolution to Localities*

The Tenth Amendment's focus on the states need not similarly constrain public policy approaches. In fact, it is difficult to understand why, given the philosophy underlying the congressional approach, specific devolution proposals stop at the state capitol, rather than reaching City Hall. If the concern is to get funds closer to the people, then municipalities are closer still. If the concern is to enable elected officials to avoid uniform rules and tailor programs and grants to local circumstances, then devolution to localities would better meet that goal. If the hope is for scores of local laboratories of innovation and efficiency, then why not thousands of such laboratories instead of fifty? And if the concern is avoiding bureaucratic paperwork, then why transfer funding to states, many of which have massive bureaucracies themselves? To the extent that block grants are intended to provide flexibility and avoid federal mandates, then why not avoid state mandates as well?[154]

In fact, there is evidence that when states receive federal block grants they then "recategorize" these grants into separate categorical state-administered programs. A good example of this occurred in the early 1980s when administration of the Small Cities Community Development Block Grant program was transferred from the national government to the states. At the time, local government officials represented by such groups as the National Association of Counties, the U.S. Conference of Mayors, and the National Association of Smaller Communities testified against the transfer.[155] An exhaustive study of state administration of the program revealed that the states created more fragmented competitions for funding than had been the case when the program was administered nationally by the U.S. Department of Housing and Urban Development. "Thus, for local communities in most states, small cities CDBG [Community Development Block Grant] was anything but a block

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154. Just as states complain about unfunded mandates from the federal government, so too do localities complain about unfunded mandates from their states. The memorandum of law submitted by the Connecticut Conference of Municipalities in support of the City of Bridgeport's authority to file a Chapter 9 bankruptcy petition provides an example:

> Bridgeport has been driven into its current need for Chapter 9 protection by circumstances largely beyond its control . . . [including] mandates imposed by the State on municipalities without adequate funding. Indeed, 82 percent of the more than 250 statutory state mandates are totally unfunded. For example, in 1989-1990 alone, Bridgeport paid $1.7 million in state mandated yet unfunded heart and hypertension benefits for police and fire personnel.
>
> Bridgeport's current state of financial distress was largely induced by the State.

Edward Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355, 1361 (1993) (quoting Memorandum in Support of City of Bridgeport's Authority to File Chapter 9 Petition at 1.5, 1.7, *In re* City of Bridgeport, 128 B.R. 688 (Bankr. D. Conn. 199) (No. 91-51519)).

155. RICH, *supra* note 94, at 111-12.

grant, as the vast majority of states 'recategorized' the block grants they received from Washington."[156]

D. *Real Citizen Involvement*

Localities also play a central role in helping to achieve the fourth key element of the new paradigm: real citizen involvement.

1. *Renewed Civic Republicanism*

While the federalism of the past twenty-five years has focused on the relationship of levels of government to each other, an improved paradigm would recognize a more fundamental relationship: that of all levels of government to the governed themselves.[157] This new paradigm would build on the notion of Civic Republicanism, which suffused the Founders' assumptions about government.[158]

Civic Republicanism sees individuals as fundamentally situated, not atomistic and isolated. It is committed to civic virtue, open-minded deliberation, substantive political equality, and participatory citizenship.[159] Its focus is on citizen participation, not just as an instrumental value, but as a good in and of itself. It is in the particular role of citizen within a common life mediated by the political community that the human good is attained.[160]

The current federalism debate has moved dramatically away from the values of Civic Republicanism. It has become so focused on the relationship among levels of government that it has failed to consider how government can be structured so as to further citizen participation and civic virtue. This "bipolar model of federalism, which considers pertinent only the nation-state balance of power . . . undermines the political space within which grass-roots citizens must act to modify governmental or legal policies."[161]

The new paradigm could remedy this failing in two ways. First, to the extent that there are shifts in power among the levels of government, it would put a thumb on the scale in favor of shifting to local governments as opposed to states. This paradigm would recognize the reality discussed above that cities and counties now play a far more substantial role in local government than was the case two hundred years ago. Second, federalism should not consider merely

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156. *Id.* at 119.

157. "[F]ederalism enhances the opportunity of all citizens to participate in representative government," Federal Energy Regulatory Commission v. Mississippi, 456 U.S. 742, 789 (1982) (O'Connor, J., dissenting).

158. *See* Tushnet, *supra* note 110.

159. *See* S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685 (1991).

160. Stephen Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685 (1992).

161. Hoke, *supra* note 159, at 696.

how power is divided among governments, but also whether efforts to deal with community problems at whatever level include citizens in the development and implementation of policies. This would address concerns about accountability (expressed by Justices O'Connor and Kennedy in *New York* and *Lopez*, respectively) through true citizen involvement rather than judicial clarification of state and federal functions. To achieve such involvement and civic virtue, all levels of government must play a supportive role.

2. *Federal Involvement as an Element of Civic Republicanism*

Recognition of the key role of Civic Republicanism returns us to the need for governmental partnership and continued federal involvement. It is true that municipalities are best situated to foster local participatory decisionmaking, but the most widespread public participation will only occur if all levels of government are involved. A commitment to furthering citizen participation does not imply radical devolution in which state and local governments are merely substituted for the federal government. Instead, it requires that the federal, state, and local officials all take this goal into account. The question is not which level of government should bear the responsibility, but rather how each level can do what it does best.

Just as the Framers created a system in which the tensions between the levels of government furthered liberty, so too must the federalism paradigm recognize that each level of government has a specific role that it plays best. Justice O'Connor argued in *New York* that a judicial role was necessary in part to keep both the state and federal governments from working together to diminish their joint accountability to the public. So too must the federalism paradigm recognize that a federal role is often necessary to encourage participation on the local level.[162]

In fact, the history of citizen participation in the twentieth century is very much the story of federal action and pressure.[163] It was Congress that in 1912 chartered Chambers of Commerce to bring forth the views of the business community, and the Agricultural Adjustment Act of 1933 stressed the need for "active participation by the people themselves in the programs of the public enterprise." The Housing Act of 1949 established an urban redevelopment program that required citizen participation through public hearings, while the Housing Act of 1954 both broadened the program into urban renewal and made citizen participation a "mandated element" and a precondition for receiving funds. The Economic Opportunity Act of 1964 set up Community Action

162. True citizen involvement would also help deal with Justice O'Connor's concern about diminished accountability.

163. ACIR, CITIZEN PARTICIPATION IN THE AMERICAN FEDERAL SYSTEM (1980) [hereinafter CITIZEN PARTICIPATION].

Agencies responsible for achieving "maximum feasible participation" while the Model Cities program in 1966 required "widespread citizen participation." The categorical programs of the late 1960s and 1970s required citizen participation on a local level, and the 1976 extension of general revenue sharing responded to the growing problem of citizen participation hearings held by municipalities after decisions had effectively been made by requiring both a proposed use hearing and a separate budget hearing.

While mandated public hearings are clearly not the best way to encourage meaningful citizen involvement, they point out a fundamental fact: while local governments are best situated to further true citizen participation, they may also require clear federal rules to achieve it. Requiring an enforcement mechanism to get elected officials to do what everyone agrees is right is not a novel idea. In fact, both leading Democratic and Republican members of Congress have argued that a constitutional amendment for a balanced budget is needed precisely because politicians would not make the tough choices necessary without being forced to do so by a higher power.

Actual experience further supports the insight that multi-leveled partnerships are most effective in furthering local goals. A study of decentralized decisionmaking in state CDBG programs found that local government officials supported targeting of funds to the most needy but were effective in accomplishing this only when someone else (in this case, the state) actually allocated the resources.[164] After an exhaustive study of citizen participation in states and localities, the Advisory Commission on Intergovernmental Relations found a clear need for federal regulation to encourage citizen access to government and to help identify the needs of diverse groups: "These are important purposes, fully justifying federal requirements, purposes that would not be adequately met if the federal government were to retire from this field."[165]

Some could argue that focusing on federal regulation of citizen participation misses the point. Don't local elected officials represent their constituencies? Isn't that what local elections are all about? It is true that local elected officials are sensitive to developments in their communities, but the paradigm suggested here approaches the issue differently. In the tradition of Civic Republicanism, it assumes that citizen participation *begins*, not *ends*, in the voting booth. It recognizes that all local elected officials must make choices based on local politics, and that those residents and groups who are not sufficiently politically powerful to influence elections should also have a voice. It thus implements one of the underlying values of federalism: providing a voice to groups which would not be in the majority on the national level and enabling them to have influence on a subnational level. In fact, it takes this one step further: rather

164. RICH, *supra* note 94, at 153.
165. CITIZEN PARTICIPATION, *supra* note 163, at 313.

than giving a voice to local majorities, it seeks to increase the voice of local minorities as well.[166] It adopts the rhetoric of shifting power from government to the people, but recognizes that the federal government's regulations may be necessary if that shift of power is not to strengthen state or even local elected officials at the expense of weakening the voice of the people outside the governmental structure.[167]

To recognize the need for a continued federal role is not to claim that current federal regulations do the trick. These regulations too often stress the formal process of public hearings rather than the actual product of resident involvement, enabling form to substitute for substance.[168] Thus, the shift in emphasis from process to results described earlier needs to occur in this arena as well. A new paradigm would stress actual citizen involvement in policy development, defining anticipated performance not in bureaucratic jargon but in words the public can understand without studying a government manual.

CONCLUSION

While federalism in America has been a continuous subject of discussion for over two centuries, the structure of the federalism debate has become flawed. These weaknesses are evident whether one examines consideration of federalism by the political branches as a guide for good public policy or by the judiciary as a constitutional issue. This Article agrees with the call for a new focus on federalism, but argues that federalism should be seen through a different prism. This new prism would focus more on the outcome desired than on formal power relationships, considering more realistically the role played by states and localities, and incorporating the role of citizens more directly into the analysis. In short, this prism would replace the omnipresent concern with ascertaining, as a matter of formal structure, which issues should be handled by which governmental level with a different concern: how to structure the system so that each level of government can contribute best to addressing the issue at hand.

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166. This is a significant step, moving from a primary concern with accountability of elected officials through the electoral process toward a focus on accountability of elected officials on a daily basis, including accountability to electoral minorities.

167. Experience shows that federal involvement is needed to identify and to further clear national objectives. A study of Oklahoma's Small Cities Program found that "[w]hen Oklahoma localities are allowed to make decisions with minimal federal and state intervention, CDBG programs are not targeted primarily to the neediest income areas." Sheilah Watson, *Decentralizing Community Development Decisions: A Study of Oklahoma's Small Cities Program*, 22 PUBLIUS 109, 122 (1992).

168. An ACIR survey in 1978 of federal grant programs found that 155 (or more than one quarter) of the programs, accounting for fully 80% of grant expenditures, had citizen participation requirements specified by statute or regulation. Of these, 89 required boards or committees reflecting the public in various ways in their membership, 55 mandated public hearings, and 114 specified other types of citizen participation including public meetings, workshops and review and consultation. *See* CITIZEN PARTICIPATION, *supra* note 163.

Until now, political analysts have justified increasing states' roles based on a belief that their immutable boundaries tend to increase efficiency, account for changing citizen preferences, and enhance local decisionmaking. Instead, states should be protected for the key role they play in stabilizing an otherwise dynamic system by ensuring that social cleavages do not threaten our nation's underlying political structure. Reform efforts at both the federal and local levels of government should focus on how to produce desired outcomes (e.g. liberty, governmental performance). Finally, the inquiry must include a recognition that interaction, partnership, and occasionally tension, between different levels of government are often all required to insure that citizen rights are protected and to give citizens the opportunity to become more engaged in America's civic society.